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Regulating the Workplace: Three Models of Labor and Employment Law in the United States

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Articles

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The laws that regulate employment relationships in the United States consist of a mixture of state and federal laws. Far from being a unified legal regime, this patchwork of different laws require attorneys practicing American labor and employment law to develop expertise in the common law of the various states, as well as in state and federal statutory regimes. This article will survey these different laws, and briefly describe how they interact with one another.

When one describes American labor and employment law to a non-American audience, two preliminary issues must be addressed. First, the United States has a federal system of government. Consequently, the laws governing American workers are not made by a single sovereign. Instead, a given employment relationship is governed by the laws of both the federal government and the state in which the employment is taking place. Thus, there is not a single law of employment relations in the United States. Instead, there are 51 different laws: the federal law, and the laws of the fifty states. In some areas of the law, federal law preempts state law.[1] In most doctrinal areas, however, the laws supplement one another.

The second preliminary issue is that 49 of America's 50 states are

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1) See Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (1974); *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

common law jurisdictions.[2] That means that large swaths of state employment law were not created by legislatures but have instead been developed, piecemeal, by state courts. Most people from non-common law systems find it perplexing, to say the least, when they find out that the most basic rules governing the employment relationship cannot be found in a statute book and were never passed by a legislature. Similarly, they are frequently puzzled by the power that a common law system gives to the American judiciary, even in areas in which the state and federal legislatures have acted. In that context, courts are given an extraordinary amount of deference when they interpret statutes.

It is against this background of federalism and unusually powerful courts that American labor and employment law has developed. It has done so in three broad areas: the common law of the employment contract; statutory limitations and modifications of that contract; and the law of labor unions and collective bargaining.

The most basic of these is the first: the common law of the employment contract. The contract law of each state has developed doctrines that regulate employment contracts. The most basic of these doctrines, one that has been adopted by a vast majority of the states, is the doctrine of "employment at will."[3] This doctrine allows either party to an employment contract to terminate that contract at will, without penalty, for any reason, or for no reason at all. Workers can quit without repercussion, and employers can fire workers whenever they like. "At will" employment contracts are the default contract in employment relationships. Of course, in the rare instance that an employee has bargaining power, he may negotiate different terms – a requirement that an employer give a reason for dismissing a worker or a provision that guarantees employment for a certain number of years, for example. Only unusually skilled employees – athletes, television or movie stars, high ranking corporate executives – get these sorts of contracts. Most employment contracts are contracts of adhesion, in which the employer

2) For general history of the common law in the United States, see John H. Langbein, Renee Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions,* pp. 473–556, 729–928 (2009). For specific monographs demonstrating the importance of the common law in nineteenth-century America, see Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (1957), and Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (1977). For the continuing importance of the common law in twentieth-century America, see Guido Calabresi, *A Common Law for the Age of Statutes* (1982); William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (2001)..

3) *See* Jay M. Feinman, *The Development of the Employment at Will* Rule, Am. J. Legal History, 118 (1976); Mark A. Rothstein, et al., *Employment Law* 746–747 (3rd ed. 2004).

unilaterally defines the terms, and in which a provision of "at will" employment is always included.

Because employment contracts are viewed by the common law as simply a particular form of contract, the common law rules that have developed for regulating contracts generally apply to employment contracts – the requirement of consideration, or the statute of frauds, for example. That said, the peculiar nature of the employment contract has led to some specialized rules. Most of these have to do with labor mobility. Courts have generally frowned on contract terms that limit the ability of workers to move from one job to another.[4] Such moves are thought to be economically beneficial because they represent workers moving to what economists call their "highest valued use." The law, it is thought, should not limit the ability of workers to switch jobs if an employer is willing to offer them a higher salary. Indeed, this is one of the underlying premises of employment at will. An employee can quit for any reason at all.

Because of this policy preference for worker mobility, courts have been reluctant to enforce modifications of the at will doctrine that limit it. Recall that most employment contracts are contracts of adhesion. Most workers do not have the bargaining power to negotiate specific terms or resist an employer's decision to insert a particular term. However, when employers have tried to insert terms in contracts that prevent workers from leaving a particular job, courts have generally refused to enforce those terms. For example, courts will not allow specific performance to be a remedy for breaching an employment contract.[5] Nor will they enforce penalty clauses that require employees to pay liquidated damages if they breach an employment contract.[6] Similarly, courts have rejected terms in employment contracts that have sought to make them "whole" – that a worker would not be paid until he finishes the period of time that the contract dictates.[7] Instead, regardless of what the contract says, courts will require an employer to pay an employee who is changing jobs for whatever period of that contract he has worked.

Recently, most of the litigation surrounding worker mobility and employ-

4) *See e.g., Columbia Ribbon & Carbon Mfg. Co. v. A–I–A Corp.*, 42 N.Y.2d 496 (1977); and *Business Networks of New York, Inc. v. Compete Network Solutions, Inc.*, 696 N.Y.S.2d 433 (1st Dep't 1999).

5) *See Clyatt v. United States*, 197 U.S. 207 (1905).

6) *See Wilson v. Clarke*, 470 F.2d 1218 (1st Cir. 1972) (stating that an employer may not require its exemployee to pay damages as a penalty to discourage job change).

7) *See Thayer v. Dial Industrial Sales, Inc.*, 189 F.Supp.2d 81 (S.D.N.Y. 2002); *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94 (2nd Cir. 1994).

ment contracts has centered around "covenants not to compete."[8] These are terms, unilaterally inserted into employment contracts by employers, that forbid an employee from working for a competitor of that employer for a certain period of time. They may also forbid that employee from giving a new employer the benefit of any knowledge or other intellectual property that he developed while working for the first employer.

Courts have not forbidden covenants not to compete. However, in enforcing them, they have balanced the policies that underlie them (expectation of worker loyalty, the desire to prevent one employer from free-riding on another employer's investment in a particular employee) with the idea that labor mobility promotes economic growth. Consequently, courts have limited them. Some courts have held that they must expire after a year, or that they may not prevent someone from working in a different field.[9] Other courts have limited the extent to which an employer can prevent his former employees from using the knowledge they have gained at their original job for the benefit of their new employer.[10] For example, California courts have held that employers cannot use employment contracts to prevent former employees from giving new employers the benefits of their experience beyond the restrictions found in conventional intellectual property rights. Indeed, California employment law, which has developed in the shadow of the high tech boom, has been particularly reluctant to allow employers to limit the mobility of their workers.[11]

The use of the common law to promote worker mobility has been an area of the law in which courts have prevented employers from imposing contractual terms that harm workers. As such, it is quite unusual. Typically, courts enforce employment contracts as written, regardless of the lack of bargaining power that the vast majority of workers have. Consequently, protections for workers have been developed not by courts but by legislatures. Indeed, legislative innovation characterizes the second area of American labor and employment law.

This area consists of statutory restrictions on the content of common law employment contracts. One of the basic principles of the common law

8) Mark A. Rothstein, et al., *Employment Law* 710-712 (3rd ed. 2004).
9) *See JAK Productions, Inc. v. Wiza,* 986 F.2d 1080 (7th Cir. 1993); *Pro Edge, L.P. v. Gue,* 374 F. Supp. 2d 711 (N.D. Iowa 2005).
10) *See, e.g., Kelly Services, Inc. v. Marzullo,* 591 F. Supp. 2d 924 (E.D. Mich. 2008).
11) Cal. Bus. & Prof. Code § 16600 (stating that "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void). *See, e.g., Edwards v. Arthur Andersen, L.L.P.,* 189 P.3d 285 (Cal. 2008); and *Asset Marketing Systems, Inc. v. Gagnon,* 542 F. 3d 748 (2008).

system is that legislative actions can always displace common law rules. The most straight-forward example of this displacement in the area of employment law is the federal government's Fair Labor Standards Act.[12] The FLSA mandates a minimum wage for all industrial and service jobs. It also requires mandatory over-time pay and prohibits child labor. Similarly, there is a federal statute regulating pensions and medical benefits that are frequently part of the compensation workers receive for their work.[13] Federal law also mandates minimum standards for workplace safety, including standards for workplace hygiene, limitations on exposure to toxic materials, and requirements of ventilation and light.[14]

Both the federal minimum wage/maximum hour regime, and the occupational safety and health regime permit state laws to supplement the federal minima. Consequently many states have their own minimum wage/maximum hours legislation that either supplements the federal legislation (requiring a higher minimum wage, for example) or that applies to workers not covered by the federal statute (agricultural workers are excluded by the FLSA but are covered by many state minimum wage laws, for example).[15]

The most controversial, and most litigated, of the statutory restrictions on common law employment contracts are federal and state anti-discrimination laws. These laws modify the employment at will doctrine to forbid employers from basing any employment decision – hiring, firing, or promotion, for example – on the employees' membership within a particular protected class. Federal law prohibits discrimination based on race, ethnicity, sex, religion, national origin, age, or disability.[16] Most states have similar prohibitions, and some states have more robust protections. California, for example, prohibits discrimination against homosexuals and defines "disability" more broadly than does federal law.[17]

On their most basic level, anti-discrimination laws simply prohibit an employer from making an employment decision based on a person's race, sex, religion, or other protected category. An employer cannot refuse to hire someone simply because she is a woman. He cannot refuse to promote

12) 29 U.S.C. §§ 201–219 (1938).
13) 29 U.S.C. §§ 1001–1461 (1974).
14) Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1970).
15) Cal. Lab. Code §§ 200–243, 510, 1140–1140.4 (West 2012).
16) *See* Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e–2000e–17 (1964); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1967); Americans with Disabilities Act, 42 U.S.C. §§ 12111–12117 (1990).
17) *See* California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900–12996 (West 2008); *Murray v. Oceanside Unified School District,* 79 Cal. App. 4th 1338 (2000); *Hope v. California Youth Authority,* 134 Cal. App. 4th 577 (2005).

someone simply because they are a Buddhist. He cannot fire someone simply because they are black. However, discrimination laws have generated a host of more complicated doctrines that are not obviously related to the simple prohibition of intentional discrimination. For example, facially non-discriminatory employment practices that have a "disparate impact" on a particular protected group are also prohibited unless an employer can offer a legitimate business justification for that policy.[18] Thus, the requirement that an employee be able to lift a certain amount of weight for a job would violate the statute that prohibits sex discrimination if the requirement had the effect of disqualifying a greater number of women than men, unless the employer could demonstrate that the job at issue specifically required employees to lift that amount of weight.

Employment discrimination statutes have also generated a host of prohibitions on harassment in the workplace. The most obvious, and most uncontroversial, of these cases involve what is known as "quid-pro-quo harassment" in which a supervisor requires sexual favors from an employee in exchange for refraining from taking an adverse employment action.[19] More controversial are claims based on what is called "creating a hostile work environment." [20] These cases have created a prohibition on treating people from a distinct group differently even though that treatment does not directly result in an adverse employment action such as being fired or demoted. Thus an employer may have violated employment discrimination laws if he allows his workers to use racial epithets around African American workers, or if he doesn't discipline workers who make sexist jokes in front of female employees.

Perhaps the most controversial area of the law that employment discrimination statutes have generated has been with respect to remedial issues, particularly the requirement of so-called "affirmative action." Employers who have systematically discriminated against a particular protected class may be required to engage in "affirmative action" to ensure that this group is represented in appropriate quantities in their work force. That is, an employer must implement a preference for a particular group. He must discriminate in favor of that group. In rare cases a court may order such a

18) *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (1964).

19) *See e.g., Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998).

20) *See generally Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986) (holding that harassment, while not affecting economic benefits, creates a hostile work environment that is actionable under Title VII).

remedy.[21] More often, an employer will engage in such a practice to avoid liability that is suggested by the fact that his workforce's racial balance is dramatically different from the population at large.[22]

While cases related to race and sex discrimination have traditionally been the most controversial, the area of employment discrimination law that has witnessed the most dramatic increase in cases involves discrimination against people with disabilities, the type of discrimination prohibited by the federal Americans with Disabilities Act of 1990 (the ADA).[23] Like other areas of employment discrimination law, the ADA prohibits employers from discriminating against people with disabilities. However, for obvious reasons, this type of discrimination cannot be totally banned. After all, not all discrimination against people with disabilities is driven by malign motives. The ADA does not require employers to hire a person for a job that their disability prevents them from doing. Airlines do not have to hire blind pilots. Symphony orchestras do not have to hire deaf conductors. Instead, the ADA prohibits discrimination against the disabled when it is motivated by prejudice. For example, there is no reason why a paraplegic could not be a librarian (or a law professor). If an employer refused to hire that person because of his discomfort of being around a person with a disability, he would have violated the ADA.

That requirement of the ADA has been uncontroversial. Indeed, it is nothing more than the general principle of employment discrimination law applied to another group: employment decisions should be made based on a person's genuine qualifications, rather than on some irrelevant, immutable attribute. However, unlike other areas of employment discrimination law, the ADA has additional requirements that have been a good deal more controversial. In particular, the law requires employers to "reasonably accommodate" the disabilities of their employees.[24] Consider the paraplegic law professor. While his disability would not prevent him from teaching, hiring him would require his employer to accommodate his disability – he might have to add ramps to the lecture halls and buy special furniture for his office, for example. An employer might not wish to take on these expenses. Thus, the employer might have a non-prejudicial reason for not hiring the law professor: he cannot afford to spend the money to make his

21) *See United States v. Paradise,* 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers v. EEOC,* 478 U.S. 421 (1986).
22) *See United Steelworkers of America v. Weber,* 443 U.S. 193 (1979).
23) 42 U.S.C. §§ 12111–12117 (1990).
24) 42 U.S.C. §§ 12111–12117 (1990).

workplace accessible to a person who uses a wheel chair. Yet the ADA would require the employer to hire the professor and make the changes to the workplace that were required to accommodate his disability. At a certain point a court might determine that the accommodations were no longer reasonable – they were too expensive, or they required changing the nature of the job – but otherwise, the employer would have to make the changes. Needless to say, American employers have objected to this infringement on their autonomy.

The final area of the law of employment relations is the law of collective bargaining. The National Labor Relations Act of 1935 (the NLRA) is a federal law that creates the right of private, non-agricultural employees to organize into unions.[25] Many states have similar laws empowering government employees and agricultural workers to organize.[26] Each of these laws prohibits a series of "unfair labor practices."[27] The most basic of these is the prohibition of discrimination against workers who are engaged in "concerted activity."[28] An employer cannot punish workers for attempting to organize a union or for joining together in some other manner to improve their terms and conditions of employment. Employers cannot threaten workers who engage in concerted activities, nor can they offer them inducements to discourage them from doing so.[29] Nor can employers create unions and force or encourage workers to join them.[30] Finally, employers must bargain in good faith with a union that represents his workers.[31]

The NLRA also prevents unions from interfering with the concerted activities of workers. They may not threaten or take adverse actions against workers who dislike the union or who are trying to organize to remove the union from the workplace.[32] The Act also prohibits unions from taking certain actions that Congress considers overly disruptive of the economy: sit-down strikes, in which workers occupy the workplace but refuse to work; secondary boycotts, in which workers picket businesses other than

25) 29 U.S.C., sections 151–169 (1988).
26) California's agricultural employees are covered by the Agricultural Labor Relations Act. California Labor Code, sections 1140–1166.3. California's public employees are covered by a variety of statutes, the most significant of which is the Dills Act. California Government Code, sections 3512–3524.
27) 29 U.S.C., section 158.
28) Id., section 157.
29) Id., section 158(a)(1).
30) Id., section 8(a)(2)
31) Id. section 158(a)(5).
32) Id., section 158(b)(1).

their employer; and "feather-bedding," in which unions force employers to pay employees who are not actually working.[33] Finally, like employers, the Act requires unions to bargain in good faith.[34]

Unlike Japanese labor law, American labor law operates under the principle of "exclusive representation."[35] This means that the workers in a given workplace vote on whether they wish to be represented by a union. If a majority of the workers vote in favor of the union, then that unions acts as the representative of all the workers at the workplace, even those who voted against it. Thus, American labor unions are required to represent the interests of workers who are not union members and who may even actively oppose the union. These workers cannot get a different union to represent them, nor can they negotiate with their employer directly. Instead, the union negotiates a contract, known as a collective bargaining agreement, on behalf of every worker in the workplace.

Unlike common law and statutory regulation of the employment contract, the American law of collective bargaining is not implemented by courts. Violations of federal labor law – firing someone for organizing a union, refusing to bargain in good faith, engaging in a secondary boycott – are adjudicated by an administrative agency called the National Labor Relations Board.[36] If a union and an employer cannot agree upon the terms of a collective bargaining agreement, the dispute is resolved through the use of private weapons of economic conflict: strikes, lockouts, picketing, boycotts, the use of replacement workers. Once a collective bargaining agreement is in place, disputes over its implementation are resolved by arbitrators that are picked by the union and the employer.[37] The role of courts in enforcing labor law is explicitly minimized.

That concludes this world-wind tour through American labor and employment law. The best way to view the relationship among these three regimes is through a historical lens.[38] The foundation of employment

33) Id., section 158 (b)(4).
34) Id., sections 158 (b)(3).
35) Id., section 159 (a).
36) Id., sections 153, 154.
37) *United Steelworkers of America v. American Manufacturing Co,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. (1960).
38) For more details on the historical development of American labor and employment law in the twentieth century, see Nelson Lichtenstein, *The State of the Union: A Century of American Labor* (2003); Nancy MacLean, *Freedom in Not Enough: The Opening of the American Workplace* (2006); Melvin Dubofsky, *The State and Labor in Modern America* (2000); and Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (1991).

law is the common law contract, governed by the common law of each individual state. Over the course of the twentieth century, policy-makers realized that relying on nothing more than this common law regime resulted in too many inequitable employment contracts. Because of the inequality of bargaining power between workers and their employers, employment contracts contained provisions that policy-makers considered unconscionable: wages were too low, working hours too high, working conditions were unsafe. Between the 1930s and the 1960s, policy-makers sought to solve this problem in two ways. First, they passed legislation that mandated particular terms of an employment contract: a minimum wage, a guarantee of certain working conditions, a promise not to discriminate against a person's race or sex. This solution presumed that the government knew what is best for workers, so it would place specific terms in every employment contract, regardless of what employers or workers wanted.

The second solution to the problem of insufficient bargaining power was to increase that bargaining power and then let the workers negotiate whatever terms they could. The way that policy-makers chose to increase the bargaining power of workers was to promote the organization of unions. Thus, under the contemporary system of labor and employment law in the United States, workers get improved terms and conditions of employment in two ways. They get them when the state and federal governments impose specific terms on all employment contracts, and they get them if they organize into unions and use their increased bargaining power to get improved terms and conditions of employment.

As this brief description of American labor and employment law and its historical development has demonstrated, state and federal law, common law and statutory law, all contribute to a patchwork of legal regimes governing the employment relationship. Practitioners must become familiar with dozens of common law rules and statutes. The irony of this complexity is that despite this abundance of law, American employers have more autonomy to define the nature of the employment relationship than do employers in any other advanced industrial democracy. The foundational principle of American labor and employment law is still the doctrine of at-will employment. Common law and statutory modifications of this principle and the ability of labor unions to engage in collective bargaining have limited employer autonomy at the margins. Nevertheless, at its core, American labor and employment law still rests on the individual employment contract, and the inequalities of bargaining power that define its contents.